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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No: 419

JOHN J. McDOUGALD, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

****

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

JOHN J. McDOUGALD, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

****

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

****

The petitioner, John J. McDougald, prays that a writ of certiorari issue to review the order of the Court of Appeals of North Carolina, entered in the above entitled case on April 23, 1970.

OPINIONS BELOW

The order of the Court of Appeals of North Carolina of April 23, 1970, denying certiorari to the Superior Court Division of the Cumberland County General Court of Justice is unreported. The order of the Superior Court Division of the Cumberland County General Court of Justice, entered in this case on March 17, 1970, is also unreported. Copies of both orders are appended to this petition.

JURISDICTION

The order of the Court of Appeals of North Carolina was made and entered on

April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), since a right is claimed under the Constitution of the United States. By reason of Section 7A-28 of the North Carolina General Statutes the order of the Court of Appeals is final and not subject to further review by the Supreme Court of North Carolina.

QUESTION PRESENTED

Whether harsher sentencing of a de novo appellant upon reconviction, where not based on identifiable conduct subsequent to the first sentencing proceeding, violates the principles of Due Process enunciated in North Carolina v. Pearce and where trial by jury is available only on appeal imposes an unconstitutional burden on the exercise of this right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

Section 7A-196(b)

In all criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law.

Section 7A-272(a)

Except as provided in this article, the district court has exclusive, original jurisdiction for the trial

of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

Section 7A-290

Any defendant convicted in district court before the magistrate may appeal to the district court for a trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for a trial de novo. ****

Section 15-177.1

In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon.

STATEMENT

Petitioner is a prisoner in the custody of the North Carolina Department of Correction serving sentences which total six years' imprisonment to be followed by two years under suspended sentences.

On February 20, 1969, in the District

Court Division of the Cumberland County (North Carolina) General Court of Justice, petitioner was tried on four charges of breaking and entering coin machines and three charges of contributing to the delinquency of a minor. The Court found petitioner guilty on each charge and sentenced him under a consolidated judgment to a term of eighteen months' imprisonment.

In apt time petitioner appealed from this sentence to the Superior Court Division of the Cumberland County General Court of Justice for a trial de novo by jury. On April 3, 1969, following verdicts of guilty on the same charges, the Court sentenced petitioner to three sentences of two years' imprisonment each, running consecutively, for a total of six years' imprisonment, and four two-year suspended sentences to run concurrently at the expiration of the active sentences.

On the trial de novo in the Superior Court Division there was no evidence of any aggravating circumstances which had not been presented for consideration of the District Court. In all material respects the evidence and contentions of the parties were the same in the trial in the District Court Division and the trial in the Superior Court Division.

Petitioner first raised the federal questions sought to be reviewed in this Court in his Petition for Post-Conviction Relief filed on January 27, 1970, in the Superior Court Division of the Cumberland

County General Court of Justice, pursuant to North Carolina General Statutes, Section 15-217, et. seq. In this petition, the above facts were recited and petitioner prayed that his present sentences be set aside or modified by reduction to conform to the sentence imposed on February 20, 1969, in the District Court Division.

By order of March 17, 1970, the Presiding Judge denied the petition without a hearing, taking the facts pleaded above to be true and concluding that on the face of the petition the petitioner was not entitled to the relief requested. The Court found without merit the petitioner's contention that the increase in sentence following reconviction on appeal violated his rights under the Constitution of the State of North Carolina and the Constitution of the United States.

Petitioner in apt time petitioned the Court of Appeals of North Carolina for a writ of certiorari to review the decision of the Superior Court Division of the Cumberland County General Court of Justice in the post-conviction proceeding. Petitioner in his Petition and Application for Writ of Certiorari carried forward the constitutional challenges to his increased sentence. Petitioner maintained that the Superior Court's prerogative to increase petitioner's sentence unconstitutionally burdened his right to appeal and to a trial by jury and was inconsistent with the principles established by this Court in North Carolina v. Pearce, 395 U.S. 711 (1969). The Court of Appeals

of North Carolina on April 23, 1970, denied the petition for certiorari without opinion.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because the courts of North Carolina have decided an important question of federal constitutional law which has not been ruled upon specifically by this Court in a way which is inconsistent with the principles established in applicable decisions of this Court.

The result in the present case was approved by the Supreme Court of North Carolina in State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970) and in State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970). The Supreme Court of North Carolina in these cases held that this Court's decision in North Carolina v. Pearce does not "apply to judgments pronounced on appeal from inferior tribunals," and specifically does not preclude imposition of more severe punishment following reconviction upon appeal through the North Carolina de novo trial procedure.

The position of the North Carolina courts, however, contravenes the applicable constitutional principles in Pearce. In order to insure that vindictiveness against a defendant who has successfully pursued a statutory right of appeal or collateral remedy not affect his sentence on reconviction, this Court in North

Carolina v. Pearce concluded that as a matter of due process

> whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 395 U.S. 711, 726.

The reasons articulated by this Court for its decision in Pearce apply with equal force to North Carolina's de novo trial procedure. Under North Carolina law the only judicial review which is open to a defendant following conviction in the District Court Division, and a necessary step in obtaining further appellate review, is an appeal for a trial de novo in the Superior Court Division. See N.C. Gen. Stat. § 7A-290. When petitioner appealed to the Superior Court Division, his first conviction was treated under North Carolina law as void in the same way his conviction would have been treated had he been successful on a conventional appeal. See N.C. Gen. Stat. § 15-177.1.

The potential for retaliatory sentencing and apprehension by defendants of retaliation through increased punishment for exercising their right of appeal are present in the North Carolina de novo trial procedure as much as in the circumstances in Pearce.

For all practical purposes one appealing for a trial de novo in the Superior Court Division in North Carolina is in the same position as other successful appellants who are now protected from retaliatory sentencing under Pearce. That a harsher sentence can be imposed following a trial de novo has the same chilling effect on a defendant's exercise of his right to appeal that this Court found objectionable in Pearce.

Moreover, not only does the position of the North Carolina courts violate due process as defined in Pearce, it also unconstitutionally burdens the defendant's Sixth Amendment right to trial by jury, which in Duncan v. Louisiana, 391 U.S. 145 (1968), was made applicable to the states through the Fourteenth Amendment.

In North Carolina trial by jury is available to a defendant only in the Superior Court Division. N.C. Gen. Stat. § 7A-196(b). There is no machinery by which a defendant may waive his non-jury trial in the District Court Division in order to have his jury trial in the Superior Court Division when he is charged with an offense which comes within the exclusive

original jurisdiction of the District Court. All misdemeanors, including serious offenses punishable with a maximum of two years' imprisonment, as was true in the instant petitioner's cases, are within the exclusive original jurisdiction of the District Court Division. N.C. Gen. Stat. 7A-272(a). Thus, the petitioner's right to trial by jury, as well as his right to appeal, were chilled by the Superior Court Division's prerogative to increase petitioner's sentence. See United States v. Jackson, 390 U.S. 570 (1968).

2. The decisions of state and federal courts in North Carolina and the decisions of courts in other jurisdictions on the important constitutional question presented are inconsistent, and an authoritative statement from this Court is needed to insure uniformity of decisions.

The position of the United States District Court for the Eastern District of North Carolina on the constitutional question presented is directly opposite to that of the Supreme Court of North Carolina. The result reached by the United States District Court in Torrance v. Henry, 304 F.Supp. 725 (E.D.N.C. 1969), is directly contrary to the decisions in State v. Spencer, 276 N.C. 535, 173 S.E. 2d 765 (1970), and State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), on this question. In Torrance v. Henry, Chief Judge Butler concluded,

> Applying the reasoning underlying Pearce, we perceive no material

distinction between a case where the defendant's original conviction has been set aside, whether by appeal or collateral proceedings, and a new trial ordered, and a case where the defendant has appealed his original conviction, and received a trial de novo. In either case a harsher sentence at retrial is a violation of due process, unless justified by the subsequent events requirement as enunciated in Pearce. 304 F.Supp. 725, 726.

Several courts which have considered the question presented are in accord with the North Carolina state courts that the principles enunciated in North Carolina v. Pearce do not extend to a de novo appellant on reconviction. These decisions, which are contrary to the position taken in Torrance v. Henry, include the decision of the United States Court of Appeals for the First Judicial Circuit in Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), the decision of the Supreme Court of Michigan in People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969), and the decision of the Supreme Court of Appeals of Virginia in Evans v. City of Richmond, ___ Va.___ , 171 S.E.2d 247 (1969).

A decision is needed from this Court on the important constitutional question presented to insure uniformity of results within North Carolina, where state and federal decisions now conflict, and among state and federal courts in other

jurisdictions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX TO PETITION

ORDER OF THE COURT OF APPEALS

OF NORTH CAROLINA DENYING PETITION

FOR ~~CERT~~IORARI

John J. McDougald

versus

State of North Carolina

No. 70SC122PC

Denied by order of the Court in Conference. The 23rd day of April, 1970.

****

ORDER OF THE SUPERIOR COURT

DIVISION OF THE CUMBERLAND COUNTY

GENERAL COURT OF JUSTICE

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

CUMBERLAND COUNTY SUPERIOR COURT DIVISION

John J. McDougald, Petitioner

versus

State of North Carolina

70CR6585

ORDER

This cause coming on to be heard upon a petition for Post Conviction Hearing relief filed by petitioner against the State of North Carolina, under date of 27 January, 1970, and it appearing to the Court and the Court finding as a fact from said petition that the petitioner-defendant is now being held under three sentences of two-years' imprisonment, each running consecutively for a total of six years' imprisonment, said sentences being imposed upon the petitioner by the Honorable W. H. S. Burgwyn, Jr., Judge Presiding over the Cumberland County Superior Court under date of April 3rd, 1969, for three separate charges of contributing to the delinquency of a minor, under G.S. 110-39; and it further appearing to the Court and the Court finding as a fact that the petitioner was tried for these same three offenses in the District Court Division of the General Court of Justice of Cumberland County, North Carolina, on February 20, 1969, and the Honorable Joseph E. Dupree, Judge Presiding, found the petitioner-defendant guilty under a consolidated judgment of the three cases, wherein the defendant received a judgment of eighteen months in the North Carolina Department of Correction; that thereafter in apt time the defendant-petitioner appealed for a trial de novo in the Superior Court Division of the General Court of Justice of the State of North Carolina and at that Session of Court referred to the three two-years consecutive sentences were imposed upon him by the Honorable W. H. S. Burgwyn, Jr., Judge Presiding, and the petitioner

contends that there was no evidence showing any aggravated circumstances between the trial in the District Court and the trial in the Superior Court and that the increase of the sentence from eighteen months to three two-years consecutive sentences or a total of six years, violated his rights under the Constitution of the State of North Carolina and the Constitution of the United States, in that it exceeded the sentence which he had received in the District Court Division.

The Court finds as a fact that the contention of the petitioner is without merit, either in law or otherwise, in that he appealed for a de novo trial, which allowed the Superior Court then presiding to impose a sentence which was within the limits allowed by statute, and that said W. H. S. Burgwyn, Jr., Judge Presiding, did not exceed the statutory maximum in imposing a judgment of three consecutive two-years' sentences for the charges for which the defendant was tried.

Now, therefore, upon the foregoing findings of fact, the petition of the defendant-petitioner, John J. McDougald, is denied, without a hearing of the petitioner, as on the face of the petition it appears that the petitioner is not entitled to the relief requested.

This the 17th day of March, 1970.

/s/Hamilton H. Hobgood
Judge Presiding

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Supreme Court of the United States

October Term, 1970

No. 419

JOHN J. McDOUGALD,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner originally filed a petition for post conviction relief in the Superior Court, Division, General Court of Justice, Cumberland County, North Carolina, which was denied in an order entered March 17, 1970, by the Honorable Hamilton H. Hobgood, Judge Presiding. Petitioner then filed a Petition and Application for writ of certiorari in the Court of Appeals of North Carolina, which, upon answer by the State of North Carolina, was denied by order of the Court in Conference on April 23, 1970 (No. 708C122PC). Copies of both orders are appended to petitioner's petition.

From the judgment below, petitioner has filed this Petition for a Writ of Certiorari to the Court of Appeals of North Carolina in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTION

DOES THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO TRIAL DE NOVO, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT XIV.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA:

§7A-290 *Appeals from district court in criminal cases; notice; appeal bond.*—Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon receiving notice of appeal, the clerk shall transfer the case to the district or superior court criminal docket. Appeal bond may be set by the judge in his discretion.

§15-177.1: *Appeal from justice of the peace or inferior*

court; trial anew or de novo.—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon.

STATEMENT OF THE CASE

On February 20, 1969, petitioner was tried on four charges of breaking and entering coin machines and three charges of contributing to the delinquency of a minor in the District Court Division of the General Court of Justice of Cumberland County, North Carolina. The Honorable Joseph E. Dupree, Judge Presiding, found petitioner guilty on each charge and sentenced him under a consolidated judgment to a term of eighteen months imprisonment.

Petitioner appealed from said judgment to the Superior Court of the General Court of Justice of Cumberland County, North Carolina, for a trial *DE NOVO* before a jury. On April 3, 1969, following verdicts of guilty to the same charges, the Honorable W. H. S. Burgwyn, Jr., Judge Presiding, sentenced petitioner to three sentences of two years imprisonment each, running consecutively, and four two-year suspended sentences to run concurrently at the expiration of the active sentences.

On January 27, 1970, petitioner filed a petition for post conviction relief, pursuant to North Carolina General Statutes, §15-217, et seq., in the Superior Court Division of the General Court of Justice of Cumberland County, North Carolina. Petitioner raised therein the question sought to be reviewed in this Court, praying that his present sentences be set aside or modified by reduction to conform to the sentence imposed in the District Court Division on February 20, 1969. By order of March 17, 1970, the Honorable Hamilton H. Hobgood, Judge Presiding, denied the petition; finding that the sentence im-

posed in the Superior Court Division did not exceed the statutory maximum, and that petitioner's rights under the Constitution of the State of North Carolina and the Constitution of the United States were not violated.

Petitioner then petitioned the Court of Appeals of North Carolina for a writ of certiorari to review the decision of the Superior Court Division of the Cumberland County General Court of Justice in the post conviction proceedings. The North Carolina Court of Appeals denied the petition for a writ of certiorari by order of the Court in Conference on April 23, 1970.

ARGUMENT

THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO TRIAL DE NOVO, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The petitioner argues that NORTH CAROLINA v PEARCE, 395 US 711; 23 L Ed 2d 656, 89 S Ct 2072 (1969), compels a holding that the increased sentence received by petitioner on trial DE NOVO in the Superior Court, after conviction in the lower, inferior court, violated the petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Courts which have considered the issue involved in the present case, which include the state courts of North Carolina, Michigan, Virginia and Maine and the United States Court of Appeals for the First Circuit, do not concur in this view. STATE v SPARROW, 7 NC App 107, 171 SE 2d 321 (1970); STATE v SPENCER, 7 NC App 282, 172 SE 2d 280 (1970); STATE v MIDGETT, 8 NC App 230, 174 SE 2d 124 (1970); STATE v SPARROW, 276 NC 499, 173 SE 2d 897 (1970); STATE v SPENCER, 276 NC 535, 173 SE 2d 765 (1970); PEOPLE v OLARY, 382 Mich 559, 170 NW 2d 842 (1969); EVANS

v CITY OF RICHMOND, 210 Va 493, 171 SE 2d 247 (1969); LEMIEUX v MAINE, 240 A 2d 206 (Me. 1968); and LEMIEUX v ROBBINS, 414 F 2d 853 (1st Cir., 1969). From the decision of the United States Court of Appeals for the First Circuit in LEMIEUX v ROBBINS, *supra*, a petition for a writ of certiorari was denied by this Court on March 30, 1970, 397 US 1017, 25 L Ed 2d 432. The decision in TORRANCE v HENRY, 304 F Supp 725 (1969), handed down by the Federal District Court for the Eastern District of North Carolina, is contrary to the position taken by the State of North Carolina.

In PEARCE, the appellant was tried and sentenced in the State superior court. His conviction was reversed on appeal after his successful attack on constitutional grounds and he was retried in the same superior court. Thus, he was clearly RETRIED in a second court of record and of equal dignity with the court which held his first trial.

The language of this Court in PEARCE implies that the principle enunciated should be limited to the facts of that case. The problem before the Supreme Court concerned

> "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 23 L Ed 2d 656, 664.

or, as otherwise stated,

> "what constitutional limitations there may be upon the general power of a judge to impose *upon reconviction* longer prison sentence than the defendant originally received." 23 L Ed 2d 656, 666.

The Court also refers to

> "a man who is *retried after his first conviction has been set aside* . . ." 23 L Ed 2d 656, 668.

and condemns the practice of a trial court following

> "an announced practice of imposing a heavier sentence upon every reconvicted defendant, for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside . . . [w]here . . . the original conviction has been *set aside because of a constitutional error* . . ." 23 L Ed 2d 656, 668.

The State submits that the instant case is readily distinguishable. The petitioner here was tried DE NOVO in the superior court under N.C.G.S. §7A-290 according to the standards enumerated in N.C.G.S. §15-177.1. The petitioner was not required to attack his conviction or sentence in the district court or seek a reversal since trial DE NOVO in the superior court is an absolute right even where the defendant pleads guilty in the lower court. STATE v MEADOWS, 234 NC 657, 68 SE 2d 406 (1951); STATE v BROOM, 269 NC 661, 153 SE 2d 384 (1967).

When an appeal of right is taken to the Superior Court the case is, in the eyes of the State, ". . . originally brought therein, . . . upon questions of law and fact, the judgment appealed from is completely annulled and *is not thereafter available for any purpose*." STATE v ANDERSON, 5 NC App 614, 615, 196 SE 2d 38 (1969). See also STATE v GOFF, 205 NC 545, 172 SE 407 (1934). Great force is added to this statement by the fact that the district courts are not courts of record.

North Carolina inferior courts do not provide for jury trials and transcripts are not available in criminal cases. To require a judge of the superior court to state the new facts upon which his sentence was based would mean, in fact, that a superior court judge could never give a greater sentence after a jury trial DE NOVO than that given by the lower court sitting without a jury. This theory was rejected by six of the Justices of the United States Supreme Court in PEARCE.

If such a theory controlled it would lead to ludicrous results and completely debilitate the machinery of justice in North Carolina. If, as sometimes happens, a defendant was

found guilty of a misdemeanor and given only a warning, but decided he had been wronged in the lower court by a finding of guilt, he could appeal to the superior court as a matter of right. On his jury trial DE NOVO in the superior court, the superior court judge would be forced to conduct a jury trial as to the issue of guilt alone. He would then be absolutely bound by the lower court's warning and could not sentence the defendant when the facts of the case justified the imposition of a sentence. This example is not farfetched and would, in all probability, arise under the petitioner's proposed theory.

In order to avoid such a result, there would be two alternatives open. In the words of Aldrich, C. J.:

> "Either the district courts would tend to give maximum sentences, out of caution, in the interest of the state, which, in turn, would have the effect of encouraging 'appeals,' or, if the district courts tended to give small sentences, the state would be led to avoid the vesting consequences by initiating cases in the superior court in the first instance. The state's two step procedure has a legitimate purpose. We see no occasion for us to expose it to any such dilemma. Rather, we hold the defendant has no constitutional right to complaint of a 'chilling effect' when, in effect, he need not stand in the draft, in the first instance." LEMIEUX v ROBBINS, *supra*, at 356.

If the superior courts were bound by the sentences imposed in the lower courts, it would render ineffective this State's present district court system in regard to criminal trials, as well as other states with similar two-step systems. The purpose of the district court is to decide those cases (most petty misdemeanors) that do not require the more extensive consideration of a superior court jury trial. If the superior court could not impose a greater sentence when such a sentence was demanded by the facts, all defendants would "appeal" to the superior court in order to obtain a second opportunity for a determination of guilt or innocence. This automatic two-step

trial procedure would result in the district court system becoming a mere stepping stone to superior court for criminal defendants, instead of serving the purpose intended by their creation, that of alleviating court congestion by determining cases that did not require jury trial. Under such a system, our criminal district courts would be a cog in the judicial machinery serving no useful purpose.

It is logical to anticipate and it should be presumed, that upon jury trials DE NOVO in the superior court more facts will be brought out than were brought out in the lower court. Jury trials in the superior court tend to result in more witnesses, more extensive cross-examination, and more evidence than do trials in the inferior court. This factor was not present in PEARCE.

The superior court in North Carolina presently tries defendants DE NOVO from the beginning to end on both the law and facts, without regard to the plea, trial, verdict, or judgment in the inferior court. Thus, the judge of the superior court is necessarily required to enter his own independent judgment, since the trial in the superior court is without regard to the proceedings in the inferior court. STATE v. MEADOWS, *supra*; STATE v. OVERBY, 1 NC App 289, 160 SE 2d 461 (1968); DOSS v. NORTH CAROLINA, 252 F Supp 298 (MD, NC 1966).

> "Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to appeal not only gives him a new trial but vacates the judgment and removes the entire case to the superior court. . . . Should he elect to take advantage of a second and free opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity." LEMIEUX v. ROBBINS, *supra*, at p. 355.

If the trial judges of this State are so devious as the petitioner seems to believe them to be, it would be a simple matter

for them to deny future appellants the very rights which PEARCE purports to protect. In every case in which appeal seemed likely, the lower court could simply sentence the defendant to the maximum sentence allowed for the offense involved. PEARCE would then be clearly inapplicable to the trial DE NOVO in the superior court. It is difficult for the respondent to ascertain how such a practice would enure to the benefit of future defendants.

It should be noted that there was no majority opinion in PEARCE. In that case, Stewart, J., was joined by Warren, C. J., and Brennan, J., leaving the other members of the court in disagreement on the issues. Respondent submits that this Court should not extend the dicta of an uncertain plurality beyond the facts involved in the case decided therein.

> "Looking at the total circumstances, where the state offers the defendant a full trial, with full right of appeal therefrom, in the superior court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of." LEMIEUX v ROBBINS, supra, at p 356.

In addition, it should be pointed out that petitioner was tried DE NOVO prior to the PEARCE decision. Whether this opinion is to be applied retroactively is yet to be determined.

CONCLUSION

The respondent respectfully requests that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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